UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

FRANCIS JAMES LAMANNA
CYNTHIA H. LAMANNA

CASE NO. 01-60684

Debtors

Chapter 7

BEACON FEDERAL as Successor in
Interest to Beacon Federal Credit Union

Plaintiff

vs.

ADV. PRO. NO. 01-80062

CYNTHIA H. LAMANNA

Defendant

APPEARANCES:

MEGGESTO, CROSSETT & VALERINO, LLP
Attorneys for Plaintiff
313 E. Willow Street, Suite 201
Syracuse, New York 13203

WILLIAM F. DREXLER, ESQ

CHRISTOPHER CHADICK, ESQ.
Attorney for Debtors
526 Plum St. Suite 100
Syracuse, New York 13204

MARY LANNON FANGIO, ESQ.
Trial Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court is the complaint filed by Beacon Federal, as successor in interest to Beacon Federal Credit Union ("Beacon Federal" or "Plaintiff"), on May 22, 2001. Beacon Federal seeks a determination of nondischargeability of a debt allegedly owed

by Cynthia Lamanna ("Mrs. Lamanna" or "Defendant") pursuant to § 523(a)(2) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Beacon Federal also requests an award of attorney's fees pursuant to the terms of its credit card agreement with Mrs. Lamanna. Issue was joined on June 25, 2001, with the filing of an answer by Mrs. Lamanna. Included with the answer was a counterclaim seeking costs and attorney's fees pursuant to Code § 523(d), based on the allegation that Beacon Federal was not substantially justified in commencing the adversary proceeding.

A trial was conducted in Utica, New York, on November 19, 2001. The Court heard testimony from Mrs. Lamanna and her ex-husband, Francis Lamanna ("Mr. Lamanna") (hereinafter jointly referred to as the "Debtors"), as well as from John M. Rey, Vice President of Business Development at Beacon Federal ("Rey"). At the close of the Plaintiff's proof, Defendant's counsel made a motion to dismiss the complaint, asserting that the Plaintiff had failed to meet its burden of proof. The Court denied the motion and following further testimony by the Defendant and her former husband, the Court agreed to take the matter under submission. In lieu of closing arguments, the Court afforded the parties an opportunity to file memoranda of law. The matter was submitted for decision on December 21, 2001.[1]

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[1] Plaintiff's original complaint asserted a cause of action based on Code § 523(a)(2)(B). On December 21, 2001, Plaintiff filed a motion pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure, which incorporates by reference Rule 15(b) of the Federal Rules of Civil Procedure, seeking to conform its pleadings to the proof at trial. The motion was heard on January 8, 2002, and on January 16, 2002, the Court signed an Order, which provided that the "plaintiff shall be allowed to file and serve on defendant's counsel an Amended Complaint to include a cause of action against the defendant, Cynthia H. Lamanna, based upon actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A) within ten (10) days of service of notice of entry of this order . . . ." A review of the docket indicates that no such Amended Complaint was filed. Accordingly, this decision will address the proof at trial only to the extent of the original cause of action based on Code § 523(a)(2)(B).

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 29 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(I).

FACTS

The Debtors filed a voluntary petition ("Petition") pursuant to chapter 7 of the Code on February 13, 2001. Debtors listed Beacon Federal as having an unsecured claim in the amount of $5,013.84 with respect to credit card charges incurred between 1998 and 2000.

On or about September 29, 1997, Mrs. Lamanna completed and signed a Beacon Federal Credit Union VISA Gold Application. *See* Plaintiff's Exhibit A. Mrs. Lamanna testified that she also had signed her husband's name to the application, indicating that it was their practice to sign each other's names on various forms.[2] It was Mr. Lamanna's testimony, however, that he had not expressly authorized the signing of the VISA application, though he acknowledged that his former wife had handled most, if not all, of the paperwork and bills while they were married.

With respect to the VISA application, Mrs. Lamanna testified that her former husband had asked that she apply for a VISA credit card and had provided her with his salary information.

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[2] Admitted into evidence was a financial aid award acknowledgment addressed to Mr. Lamanna and admittedly signed by Mrs. Lamanna on or about November 8, 1995. *See* Defendant's Exhibit 13. Also admitted into evidence was the 1997 tax return of the Debtors, dated April 14, 1998, to which Mrs. Lamanna admitted she signed both her name and her then husband's name. *See* Defendant's Exhibit 14. Mr. Lamanna had signed a charge slip on Mrs. Lamanna's master card account for a piece of exercise equipment on February 29, 1996. *See* Defendant's Exhibit 7.

Mr. Lamanna, however, testified that he had other credit cards and had not made such a request. In fact, it was his testimony that in June 1997 he had taken out a $38,000 loan solely in his name to purchase a boat and had no need for additional credit.

On the application, Mrs. Lamanna listed her gross salary as $29,500 and additional income of $5,000, for a total of $34,500. She also listed Mr. Lamanna as a co-applicant on the account, earning a gross salary of $35,500 per year. Rey testified that according to the debt ratio sheet attached to the application, it appears that the original wages and income initially considered by the loan officer and written in blue ink totaled only $34,500. *See* Plaintiff's Exhibit B. Monthly expenses totaled $1,473 originally, based on the numbers on the form in blue ink. *See id.* There were also notations on the worksheet listing other bank cards and retail cards not included on the application. *Id.* Mrs. Lamanna explained that she had only listed major debt on the application, including a mortgage, knowing that Beacon Federal would run a credit check on her and her husband before approving any credit.

According to Rey, the debt to income ratio for the figures as originally listed in blue ink and assumed to be those of Mrs. Lamanna alone exceeded 61%. He testified that if the debt to income ratio exceeded 38%, the loan officer generally would inquire whether there was an additional individual in the household whose income would bring the ratio down if included as a co-applicant. In this case, Mr. Lamanna's salary and expenses were added to the debt ratio sheet, as noted in black ink, resulting in monthly disposable income of $5,833.33 and monthly expenses of $2,206 for a debt to income ratio of 38%. *See id.* Rey testified that as the Loan Administrator in 1997 for Beacon Federal, he had approved a $5,000 credit limit to the Debtors on or about October 23, 1997. *See* Plaintiff's Exhibit A and Defendant's Exhibit 1. It was his

testimony that he would not have approved the application without Mr. Lamanna's signature as co-applicant.

Mr. Lamanna testified that he had never used the VISA account from Beacon Federal to make any purchases. Mrs. Lamanna took exception, testifying that her former husband had used it several times to charge dinners out and also to rent a car in Florida. However, she provided no evidence to support her allegations in the form of signed charge slips on the VISA account.

On or about June 8, 1998, the Debtors executed a Home Equity Credit Line Revolving Loan Agreement with Household Finance Realty Corporation of New York. *See* Defendant's Exhibit 2. As part of that agreement, the Debtors/Borrowers directed that certain disbursements be made from the monies being advanced. Included in those disbursements was one to Beacon Federal Credit Union in the amount of $4,944 to pay off the VISA charge card. Both Debtors personally signed the Revolving Loan Agreement on June 8, 1998. Mr. Lamanna testified that although he had signed the agreement, he had not examined who was being paid off with the monies.

On or about August 17, 2000, the Debtors were given an additional loan from Beacon Federal in the amount of $33,776.44 to purchase a 2001 Chevrolet Silverado truck. *See* Defendant's Exhibit 4. The vehicle was registered in Mr. Lamanna's name and Mrs. Lamanna signed as "co-borrower." *See id.* A review of the proofs of claim filed against the Debtors shows one filed on behalf of Beacon Federal on November 19, 2001, with respect to the loan for the Chevrolet Silverado. There is no proof of claim filed in connection with the VISA credit card account.

DISCUSSION

Code § 523(a)(2)(B) excepts from discharge any debt for money, property, services or an extension, renewal or refinancing of credit to the extent obtained by use of a statement in writing (i) that is materially false; (ii) respecting the debtor's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive. Each element must be proven by the creditor by a preponderance of the evidence. *See DeBuono v. Fanelli (In re Fanelli)*, 263 B.R. 50, 60 (Bankr. N.D.N.Y. 2001), citing *Bethpage Federal Credit Union v. Furio (In re Furio)*, 77 F.3d 622, 624 (2d Cir. 1996). Furthermore, exceptions to the discharge of a debt are to be strictly construed against the creditor and liberally in favor of the debtor. *See MBNA America v. Parkhurst (In re Parkhurst),* 202 B.R. 816, 820 (Bankr. N.D.N.Y. 1996).

The first element that must be established is the existence of a debt between the debtor and the creditor. At the trial, Rey identified an exhibit which allegedly showed a balance due on the VISA account. However, the exhibit was not offered into evidence, and there was no testimony that he had any personal knowledge of the debt in his current role as Vice President of Business Development. Although the Defendant denied allegations in the Complaint referencing a revolving credit note and a debt of $5,274.56,[3] the Debtors did identify a debt in their schedules owed to Beacon Federal on a VISA credit card for the period from 1998 to 2000. In the absence of any denial of a debt to Beacon Federal during her testimony, the Court finds

[3] Specifically, Defendant denied paragraphs 1 and 8 of the Complaint.

that a debt on a VISA credit card with Beacon Federal did exist on the date the Petition was filed.

Pursuant to Code § 523(a)(2)(B), it is also necessary that Plaintiff establish that the debt, whether it be in the form of money, services or an extension of credit, arose as a result of the written statement of the Defendant that is alleged to be materially false. In this case, there was evidence that on or about June 8, 1998, the Debtors obtained a home equity loan, and that proceeds of that loan, totaling $4,944, were used to pay off the VISA credit card account with Beacon Federal. Mrs. Lamanna testified that the home equity process had been initiated by her in an effort to reduce the charges on various accounts on which monies were owed, and that the VISA account had been the first debt listed to be paid off. Accordingly, any debt which may have existed at the time the Debtors filed their Petition arose after June 8, 1998. In continuing to allow the Debtors to use the VISA credit card, it is reasonable to conclude that Beacon Federal relied on their payment history and not on the application completed and signed by Mrs. Lamanna in 1997.

The payoff in June 1998 also lends support to Defendant's argument that at the time she applied for the account, she had no intention to deceive Beacon Federal. In signing her husband's name to the application, she was simply continuing what had evolved during the marriage as a course of conduct whereby she managed the financial affairs and paperwork for the couple and both signed one another's names as the need arose. There is every reason to believe that if Mr. Lamanna had been presented with the VISA application, he would have simply signed it just as he had when the couple applied for the home equity loan. As Mr. Lamanna testified, "the rest of the paperwork [in connection with the home equity loan] did not mean anything to me." He looked at the amount being borrowed and co-signed on the loan without questioning any of the

debts that were to be paid off.

Thus, the Court concludes that the evidence as presented has not by a preponderance convinced the Court that the signature of by Mr. Lamanna, affixed by Mrs. Lamanna on the application in 1997 constituted a materially false statement concerning the Debtors' financial condition. *See Continental Grain v. Forester (In re Forester)*, 28 B.R. 249, 251 (Bankr. W.D.Mo. 1983). In that case, the debtor had signed the names of his parents on a credit application by his business. The court found that there was no evidence that the list of assets and debts were incorrect and held that the evidence was insufficient for it to conclude "that the fact that Charlie Forester signed his parents' names to the statement represents a material falsity upon which Allied relied to its detriment." *Id.* Based on the evidence presented at trial, the Court finds that Plaintiff has failed to meet its burden of proof with respect to Code § 523(a)(2)(B) and also is not entitled to an award of costs and attorney's fees.

With respect to the Defendant's request for costs and attorney's fees pursuant to Code § 523(d), the Court concludes that based on the fact that the VISA account had been paid off in 1998 and that Beacon Federal made a subsequent loan to both Debtors in 2000 in excess of $33,000, it was not substantially justified in asserting a cause of action based on Code § 523(a)(2)(B) based solely on the assertion that Mr. Lamanna had not expressly authorized his signature by his wife on the application in 1997. The Court finds it somewhat disturbing that Beacon Federal chose not to present the Court with any evidence concerning the charges/history of the VISA account. That information, available to Beacon Federal, might have provided support for Mrs. Lamanna's assertion that her former husband had used the VISA card at various times.

Therefore, the Court will grant the Defendant's motion seeking costs and attorney's fees and will ask that Defendant's counsel and trial counsel file and serve Plaintiff with an accounting of those fees prior to seeking approval from the Court in a subsequent Order.

Based on the foregoing, it is hereby

ORDERED that Beacon Federal's complaint seeking a dischargeability of an alleged debt owed to it by Defendant pursuant to Code § 523(a)(2)(B), as well as costs and attorney's fees, is denied; it is further

ORDERED that Defendant's counterclaim seeking costs and reasonable attorney's fees is granted pursuant to Code § 523(d); and it is finally

ORDERED that Defendant's counsel and trial counsel file and serve on Plaintiff's counsel an accounting of costs and attorney's fees within ten (10) days of this Order for subsequent consideration by the Court.

Dated at Utica, New York

this 27th day of March 2002

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STEPHEN D.GERLING
Chief U.S. Bankruptcy Judge